STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 2013
v	No. 310063 Kent Circuit Court
MARCIAL TRUJILLO, Defendant-Appellant.	LC No. 11-002271-FH

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his bench-trial conviction for possession of less than 25 grams of a controlled substance (cocaine), MCL 333.7403(2)(a)(*v*). He was sentenced to 240 days in jail. We affirm.

The cocaine was discovered as part of a search incident to arrest after the arresting police officer had first noticed defendant sitting behind the wheel of a parked truck, lingering in the parking lot of a market and drinking from a blue can. The officer approached the truck in his police cruiser, activated his overhead lights, parked behind defendant's truck, and seized the truck and its occupants, which included defendant and one other individual sitting in the passenger seat. The officer observed an open beer can in a cup holder in the truck's console. Defendant was ordered out of the truck and told by the officer that he was under arrest for an open intoxicant in violation of a city ordinance. After defendant exited the truck, the officer smelled alcohol on his breath. Defendant conceded that he had been drinking a beer. The officer later testified that he approached, seized, and then arrested defendant for criminal trespass and for the open intoxicant. The officer performed a search incident to arrest and discovered individual bags of "white powder," later confirmed to be cocaine, in defendant's pants pocket, coat pocket, and change purse. Defendant was then given his *Miranda*[1] warnings. Subsequently, a charge of criminal trespass was dismissed, the court acquitted defendant of a charge of possession of an open intoxicant under state law, not the ordinance, and defendant was found guilty of possession of cocaine. Defendant had moved to suppress the cocaine evidence on the basis that the search was unconstitutional. The trial court denied defendant's motion.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

On appeal, defendant maintains that the arresting officer lacked probable cause to arrest him for criminal trespass, that the officer lacked reasonable suspicion or probable cause to seize defendant for an open intoxicant, and that the city ordinance prohibiting possession of an open intoxicant in a vehicle parked in a place open to the general public conflicted with MCL 257.624a, which is comparable to the ordinance, except that a statutory violation can only arise from the possession of an open intoxicant while in a *moving* vehicle in a public place. We conclude that there existed reasonable suspicion of an ordinance violation regarding open intoxicants, thereby permitting the initial seizure of defendant and his vehicle, that there existed probable cause to arrest defendant under the ordinance for an open intoxicant, and that, assuming the ordinance is preempted by state law for being in conflict with the Motor Vehicle Code, there is no basis to invoke the exclusionary rule under the circumstances. We therefore find it unnecessary to resolve whether there was probable cause to arrest defendant for criminal trespass or to resolve whether the city ordinance actually conflicts with and is preempted by the state statute.

A trial court's factual findings at a suppression hearing are reviewed for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). "But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress." *Williams*, 472 Mich at 313. The Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11, secure the right of the people to be free from unreasonable searches and seizures. *People v Brown*, 279 Mich App 116, 130; 755 NW2d 664 (2008). The touchtone of any Fourth Amendment analysis is reasonableness, and reasonableness is measured by examination of the totality of the circumstances. *Williams*, 472 Mich at 314.

While the case addressed an investigative stop of a moving vehicle, the following underlying principles set forth in *People v Steele*, 292 Mich App 308, 314-315; 806 NW2d 753 (2011), are also relevant here:

> The stop of defendant's vehicle implicated defendant's right to be free from unreasonable searches and seizures. Both the United States and Michigan Constitutions guarantee protection against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). The Fourth Amendment search and seizure protections also apply to brief investigative detentions. See *People v Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004), overruled on other grounds by *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006). However, in *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court held that the Fourth Amendment permits a police officer to make a brief investigative stop (a "*Terry* stop") and detain a person if the officer has a reasonable, articulable suspicion that criminal activity is afoot. The police may also make a *Terry* stop and briefly detain a person who is in a motor vehicle if the officer has a reasonable, articulable suspicion that the person is engaged in criminal activity. *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001).

> In determining reasonableness, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity. *Terry*, 392 US at 21-22. "The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances." *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996). "[I]n determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars . . . .'" *Oliver*, 464 Mich at 192, quoting *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training and experience. *Terry*, 392 US at 27. The United States Supreme Court has said that deference should be given to the experience of law enforcement officers and their assessments of criminal modes and patterns. *United States v Arvizu*, 534 US 266, 273-274; 122 S Ct 744; 151 L Ed 2d 740 (2002); see also *Oliver*, 464 Mich at 196, 200. Fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved than when a house or home is involved. *Oliver*, 464 Mich at 192.

The city ordinance that served as the basis, in part, for the officer to approach and seize the truck and defendant, Grand Rapids Ordinance, No. 74-6, § 9.243 (Chapter 157 – Alcoholic Liquor), provides in pertinent part:

> No person shall transport or possess any alcoholic liquor in a container which is open, uncapped or upon which the seal is broken within the passenger compartment of a vehicle upon any street or roadway or any other place open to the general public, including any area designated for the parking of motor vehicles . . . .[2]

The ordinance does not state that the vehicle must be moving at the time of possession of the open alcoholic container, although the ordinance also does not expressly state that a violation can occur when the vehicle is parked or not moving. However, defendant accepts, and makes no argument to the contrary, that the ordinance is applicable to nonmoving vehicles, so we shall proceed on that assumption. Under the totality of the circumstances, and taking into

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[2] MCL 257.624a(1) provides:

> [A] person who is an operator or occupant shall not transport or possess alcoholic liquor in a container that is open or uncapped or upon which the seal is broken within the passenger area of a vehicle upon a highway, or within the passenger area of a *moving* vehicle in any place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, in this state. [Emphasis added.]

consideration reasonable inferences based on the facts, along with drawn conclusions predicated on the arresting officer's training and experience, including assessment of criminal modes and patterns, there was no error in finding that the arresting officer had a reasonable, articulable suspicion that criminal activity was afoot, i.e., violation of the city ordinance. The officer testified that while he was driving by the Grandville Marketplace, he observed defendant sitting in his truck in the market's parking lot. Fifteen minutes later, when the officer drove by the parking lot for a second time, defendant was still sitting in the truck in the parking lot. The officer directly observed defendant drinking from a blue can, although the officer testified that he did not know what type of beverage was in the container based simply on its appearance. However, based on his knowledge and experience that individuals commonly and regularly parked in the Grandville Marketplace parking lot and consumed alcohol, along with the fact that defendant had been sitting there idle for 15 minutes, the officer believed that defendant was drinking alcohol in his vehicle. Upon suspicion that defendant had an open container of alcohol in the truck in violation of the city ordinance, the officer seized defendant's vehicle, defendant, and his passenger. While we believe that it is a close call, the trial court did not err in its findings relative to the officer's seizure decision.[3]

Once properly at the vehicle, and upon discovery that defendant had an open intoxicant and had been drinking, the police officer had probable cause to make an arrest for violation of the open intoxicant ordinance. "A peace officer, without a warrant, may arrest a person . . . [when an] ordinance violation is committed in the peace officer's presence." MCL 764.15(1)(a). Given the lawful basis to arrest defendant, the associated search incident to the arrest, whereupon the cocaine was discovered, was constitutionally sound. *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008) ("Once police officers lawfully arrest a person, the officers may search that person without further justification.").

Defendant seeks to avoid the above analysis and conclusion by arguing that the city ordinance is invalid, where it is preempted by state statute given the alleged direct conflict between the ordinance and statute. Defendant maintains that a conflict exists because the statute does not forbid possessing an open intoxicant in a nonmoving vehicle in a location open to the public. We decline to address the merits of this argument. Assuming that the ordinance is preempted by state law, there is no basis to invoke the exclusionary rule, considering that the

[3] We do note that given the fact that the vehicle was parked and parked in a lot open to the public, it would not have been unconstitutional for the officer to approach the truck, without seizing it and absent probable cause and reasonable suspicion, and simply engage in voluntary conversation with defendant, at which time the officer would have definitively discovered that defendant was drinking alcohol from the container. See *People v Sinistaj*, 184 Mich App 191, 196; 457 NW2d 36 (1990) (a police officer does not violate the Fourth Amendment by merely approaching an individual on a street or other public place and asking the person whether he or she is willing to answer some questions).

arresting officer did not engage in any misconduct; he was simply applying a city ordinance, which was in effect, in a nonculpable, innocent manner, absent deliberate, reckless, or grossly negligent disregard for the Fourth Amendment. *People v Hill*, __ Mich App __; __ NW2d __, issued February 5, 2013 (Docket No. 301564), slip op at 5-7, citing and quoting *Davis v United States*, __ US __; 131 S Ct 2419, 2426-2429; 180 L Ed 2d 285 (2011). The United States Supreme Court in *Davis*, *id.* at 2428, citing *Illinois v Krull*, 480 US 340; 107 S Ct 1160; 94 L Ed 2d 364 (1987), noted that the good-faith exception to the exclusionary rule had been extended "to searches conducted in reasonable reliance on subsequently invalidated statutes." Once again, assuming the invalidity of the city ordinance, it was nonetheless reasonable for the officer to rely on the ordinance, given that we have not been made aware of any cases, predating the stop and arrest here, suggesting the ordinance's invalidity, nor is there any indication that the officer himself had doubts or qualms about the soundness of the ordinance or information calling it into question.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra